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No. 87-40

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLSTATE INSURANCE CO.,
Petitioner,

v.

JACK RANDY HAWKINS and CYNTHIA HAWKINS,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

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BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

By presenting the "relevant" facts in a selective and misleading manner, petitioner Allstate Insurance Company implies that this case involves little more than an insurer's $200 underpayment of an insurance claim arising out of the "total loss" of an insured automobile, for which the insurer was subjected to a $3.5 million punitive damage award. A more complete and accurate presentation of the record reveals that the underpayment to respondents Jack and Cynthia Hawkins was substantially greater and was not an isolated event. Instead, that underpayment was the result of a conscious and longstanding corporate policy to profit Allstate millions of dollars by deliberately underpaying *all* such claims. Pursuant to that policy, petitioner repeatedly engaged in a broad range of malicious actions, all in a conscious effort to coerce respondents to accept less than the fair market value of their automobile.

It is undisputed that the policy required petitioner to pay "the actual cash value" of the destroyed automobile, that actual cash value meant the automobile's "fair market value just prior to destruction," and that the jury was so instructed, without objection. Trial Transcript (hereafter, "Tr."), vol. 6, p. 5. *See also id.*, vol. 5, pp. 15-18, and the Appendix to Petition For Review to the Arizona Court of Appeals (hereafter, "Ariz. Rev. App."), No. 5 at 9. It is also undisputed that the policy obligated petitioner "to deal fairly in handling a claim made by its insured under the policy, and . . . to make *full payment* of promised benefits to its insured," and the jury was so instructed, without objection. Tr., vol. 6, p. 6 (emphasis added).

Despite these obligations, the evidence at trial established that petitioner refused to make full payment of fair market value, and that its refusal was consistent with and required by petitioner's longstanding corporate policy of "chiseling" its insureds. Testimony of Jan Mauritz, Esq., a former Senior Claims Representative

for petitioner. Tr., vol. 4A, p. 38, Ariz. Rev. App., No. 13 at 38. This policy was designed to reduce the payments petitioner would have to make on legitimate claims by amounts that were relatively small in individual cases, but very substantial in the aggregate, so that all payments would be "substantially below fair value." *Id.*

The jury, the Court of Appeals, and the Arizona Supreme Court all concluded that the evidence justified an award of punitive damages. Those factual findings are not at issue here, so respondents will note only some of the evidence that supported the award:

Petitioner's claims adjuster determined, using the "Blue Book" retail value, that the fair market value of respondents' car immediately before the accident was $6,545. Ariz. Rev. App., No. 7. In making this determination, however, the adjuster ignored many features and options of the insured car (such as power windows, undercoating, etc.) that would have increased its Blue Book value. *Id.*; *Hawkins v. Allstate Insurance Co.*, 733 P.2d 1073, 1076 (Ariz. 1987); Appendix to Petition for Writ of Certiorari ("Pet. App.") 3a. The adjuster admitted at trial that the value of those options and features should have been added to his determination of Blue Book value, and that the resulting fair market value, per the Blue Book, would have been at least $7,300. Ariz. Rev. App., No. 10 at 37; Tr., vol. 3, p. 37.

Blue Book valuations already take into consideration "the car's condition immediately prior to the loss." 733 P.2d at 1076; Pet. App. 3a. Blue Book valuations "include deductions for the condition of the exterior of the car, paint, bumpers, upholstery, glass, tires and clean up," if those deductions are "needed to bring the car to average retail condition." 733 P.2d at 1076; Pet. App. 3a. Nevertheless, after supposedly determining the Blue Book value of respondents' car, considering its condition and cleanliness, petitioner's claims adjuster further reduced that value by automatically deducting a $35 "clean-up fee" from the Blue Book estimate. Ariz. Rev.

App., No. 7. He did so even though he had indicated on the Blue Book appraisal form that the "condition" of the car was "ok" in every respect, including cleanliness. *Id.*

The adjuster then obtained, by telephone, dealer estimates, ranging from $6,150 to $6,300, of the value of allegedly "similar" cars. These estimates were based on the adjuster's knowingly incomplete description of the insured car to those dealers, in which he failed to mention many of the insured car's more valuable features and options. 733 P.2d at 1076; Pet. App. 3a. Based on these dealer estimates, petitioner's adjuster estimated the value of respondents' car at $6,200 and, again, automatically deducted a $35 cleaning fee from that "market" estimate. 733 P.2d at 1076; Pet. App. 3a-4a.

The adjuster then selected four allegedly "similar" cars and instructed respondents to see if one of them would be a satisfactory replacement. However, when respondents chose one of the cars selected by the adjuster, he "would not let [respondents] have the car they selected," even though it was one of the four cars he had selected as "similar" to their destroyed car. 733 P.2d at 1076; Pet. App. 4a. The adjuster claimed that car was not comparable to respondents' car because respondents' car allegedly had "excessive mileage." Tr., vol. 1, p. 41. Ariz. Rev. App., No. 8 at 41. In fact, in his first conversation with respondents the adjuster had said "he would have to deduct approximately [$]300 off" the average retail value of respondents' car because of the allegedly excessive "amount of miles" on the car. Tr., vol. 4A, p. 12. Ariz. Rev. App., No. 13 at 12. The adjuster knew this statement was false and that respondents' car actually had *fewer* miles than the average car of its age. Indeed, because of its unusually low mileage, respondents' car was entitled to a Blue Book "mileage factor" *credit* of $250, which the claims adjuster included on his worksheet when estimating its Blue Book value. Ariz. Rev. App., No. 7.

After rejecting respondents' choice among the four cars identified by petitioner, petitioner's adjuster "selected one of the other cars and insisted that [respondents] take it." 733 P.2d at 1077; Pet. App. 4a. Respondents refused because this car "had few of the options their insured car had and was not comparable in either quality or gas mileage." *Id.*[1]

At that point, although petitioner's adjuster had himself concluded, based on his determinations of Blue Book value and dealer estimates, both of which he knew were less than fair market value, that the car had been worth *at least* $6,200-$6,545, he nevertheless told respondents, "in a take-it or leave-it fashion" (Pet. App. 41a), that "unless they took the car he had selected" he would only "pay them $4,500 in cash." 733 P.2d at 1077; Pet. App. 4a. *See also* Tr., vol. 1, p. 41; Ariz. Rev. App., No. 8 at 41. They refused. "Later, during the same conversation, [the adjuster] threatened to deliver a check for $5,000." *Id.*

Three days after petitioner's agent made this threat, respondents agreed to accept the car petitioner had insisted they accept. They purchased the car only after they were assured by petitioner's agent that the replacement car (which lacked power windows, had inferior gas mileage, and lacked other features of the insured car) would "be brought up to the insured car's standards." 733 P.2d at 1077; Pet. App. 5a. That assurance was not honored. For example, although respondents were not able to have power windows installed for less than $600, petitioner would only pay $125 towards that installation. 733 P.2d at 1077; Pet. App. 5a. Petitioner "refused to make any other adjustments and closed the file." *Id.*

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[1] An auto mechanic familiar with both cars testified that "there was no comparison," that the car selected by petitioner's claims adjuster was worth "probably 75 percent of [respondents'] car," and that the "original car was [a] much, much better car, it was better equipped, more economical . . ." Tr., vol. 2, pp. 65-66; Ariz. Rev. App., No. 9 at 65-66.

Testimony by three of petitioner's former claims adjusters, including an adjuster employed at the Phoenix office that handled respondents' claim, established that this conduct was consistent with and required by a long-standing corporate policy. This testimony showed, *inter alia*, that petitioner's adjusters were instructed to make various deductions, including a $35 clean-up fee, from the fair market value of all claims, even though market value already reflected cleanliness, tire-wear, etc., and regardless of the insured car's actual condition.[2]

Adjusters were also instructed "to offer an insured the lowest value of a claim because the insured probably would take it in order to get his car fixed quickly;" and adjusters were "frequently" told that "if you could save one dollar on a million claims, you would save the company as much as a million dollars." These practices were clearly established "corporate policy." They were taught to adjusters at petitioner's regional claims schools, were repeated and emphasized by supervisors, and "were promulgated through corporate literature and policy statements." 733 P.2d at 1078; Pet. App. 6a-8a. This corporate policy had been in effect for up to 18 years. 733 P.2d at 1085; Pet. App. 21a.

Indeed, there was substantial evidence that adjusters who failed to implement this corporate policy would jeopardize their "opportunity to be promoted." Tr., vol. 4A, p. 38. Adjusters' "promotion potential" was regularly evaluated on the basis of how "severe" they had been in paying claims. 733 P.2d at 1078; Pet. App. 7a. Although adjusters who had not been sufficiently severe reduced their chances for promotion, "[i]f an adjuster does exceptionally well," and his claim payments were "substantially below the average" of the other adjusters

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[2] In fact, an ex-claims adjuster from Petitioner's Phoenix office testified that adjusters were instructed to deduct the $35 clean-up fee even if the car was "brand new" and was destroyed as it left the dealer's lot. Tr., vol. 3A, pp. 23-24; Ariz. Rev. App. No. 11, pp. 23-24.

(all of whom were implementing petitioner's policy), "he would receive praise for it." This practice provided an "incentive . . . to offer as little as possible because it works to the adjuster's personal benefit." [3]

The jury concluded that petitioner's longstanding policy of deliberately paying less than fair market value on all automobile total loss claims warranted an assessment of $3.5 million in punitive damages. The trial judge, however, granted petitioner's motion for judgment notwithstanding the verdict on the ground that the evidence was insufficient to sustain an award of punitive damages. In the alternative, the trial judge ordered a new trial. The court of appeals reversed the judgment n.o.v., concluding that the evidence of petitioner's "hardball tactics," Pet. App. 41a, was sufficient to justify an award of punitive damages. The court of appeals affirmed the order for a new trial, however, ruling, on state law grounds, that testimony by one witness was improperly admitted, and that the *amount* of the punitive damage award was not justified by the evidence.

The Arizona Supreme Court, which has a record of carefully reviewing punitive damage awards in insurance bad faith cases to determine if they were excessive, *see* note 15 *infra*, reinstated the jury verdict. After ruling that all of the challenged evidence was properly admitted, it ruled that the evidence was sufficient to support a punitive damage award of $3.5 million. The court considered whether the amount of damages was excessive "in light of the particular nature of [petitioner's] conduct," and held that "[t]he jury could have rationally concluded that [petitioner's] conduct was *highly reprehensible and resulted in harm to countless insureds*," who "would be unlikely to discover or prosecute this miscon-

[3] Tr., vol. 4A, p. 46. *See also id.* at 39 ("the message inescapable to an adjuster is that the lowest dollar is the best dollar as far as his performance rating is concerned"); Tr., vol. 3A, p. 39 (discussing petitioner's computerized "severity printouts" and its weekly meetings to evaluate adjusters' severity performance).

duct." 733 P.2d at 1085; Pet. App. 21a (emphasis added). The court also found that these "deceptive claims practices" had been "established company policy" for "up to 18 years." *Id.* And the court found that the punitive damage award was not "disproportionate" to the nature of the offense or to petitioner's financial position, because the award represented petitioner's net income for only 3½ days, or 1/25th of 1% of its total reported assets of $8.6 billion. 733 P.2d at 1084; Pet. App. at 20a.

The Arizona Supreme Court expressly declined to consider *any* of petitioner's constitutional challenges to punitive damages because those challenges were "belatedly urged" for the first time in a supplemental brief filed after oral argument in that court. 733 P.2d at 1086; Pet. App. 24a.

SUMMARY OF ARGUMENT

Certiorari should be denied because: a) petitioner expressly waived its Eighth Amendment argument, and failed to present its Due Process arguments below in a timely manner, as required by consistently applied state practice; b) petitioner waived two of its Due Process arguments by failing to object to jury instructions that were squarely inconsistent with those arguments; c) the decision below is not even alleged to be in conflict with any other lower court decision; d) the decision below is not even alleged to be directly inconsistent with any prior decision of this Court; and e) there is no urgent reason, in the context of this case, for the Court to resolve these constitutional questions, which implicate important and longstanding state interests.

The Eighth Amendment and Due Process challenges to punitive damage awards petitioner attempts to raise here are not novel legal theories. They have been raised without success in numerous lower courts over the past two decades. In this case, petitioner deliberately chose not to raise its Eighth Amendment challenge at *any*

stage below. And it chose not to raise any of its Due Process challenges at trial, in the intermediate appellate court, or in a cross petition to the Arizona Supreme Court. Instead, petitioner raised its Due Process challenges for the first time in a supplemental brief filed *after oral argument* in the Arizona Supreme Court. That court invoked a consistently applied state practice and expressly declined to consider those "belatedly urged" post-argument claims because "[e]fficient and orderly administration requires some point in time at which it is too late to raise new issues on appeal." 733 P.2d at 1086; Pet. App. 23a.

This Court has previously noted that the applicability of the Eighth Amendment and the Due Process Clause to punitive damage awards raises important questions that "*in an appropriate setting*, must be resolved," *Aetna Life Insurance Co. v. Lavoie*, 475 US 813, 89 L.Ed.2d 823, 837 (1986) (emphasis added). But this is not an appropriate setting in which to consider those questions.

First, although petitioner claims that its Eighth Amendment argument "is presently *sub judice* in this Court in *Bankers Life and Casualty Co. v. Crenshaw*, No. 85-1765" and is therefore "manifestly deserving of plenary consideration" (Pet. at 15), petitioner *expressly waived that Eighth Amendment argument in the Arizona Supreme Court.*[4] Point I.A.

Second, because petitioner failed to present any of its Due Process questions below in a timely manner, and the Arizona Supreme Court declined to consider them on a legitimate and consistently applied state ground,

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[4] Even in *Bankers Life* the Court did not separately grant certiorari to consider that Eighth Amendment issue, which is pending before the Court only on a tag-a-long writ of certiorari as ancillary to an appeal issue the Court was required to hear. The Appellee in *Bankers Life* has urged the Court to dismiss certiorari on that issue as improvidently granted on the ground that in that case, as here, the Eighth Amendment issue was not raised in the court below.

this case is not "an appropriate setting" to consider them. That is the lesson of *Judy's Foods, Inc. v. A & B Food Services Corp.*, 107 S Ct 460 (1986), which was decided after *Lavoie*. There, as here, petitioners asked the Court to consider the applicability of the Due Process Clause (and the Eighth Amendment) to a punitive damage award. The respondents argued that those questions were not appropriate for review because they had been raised for the first time in supplemental post-argument briefs in the highest court below. The Court denied review there, and petitioner has suggested no reason why review would be more appropriate here. Point I.B.

Third, petitioner waived two of its Due Process arguments—its challenge to the preponderance of the evidence standard and its challenge to the jury's consideration of the "duration" of its wrongful conduct—by failing to object to jury instructions that were squarely inconsistent with those arguments. Point I.C.

Furthermore, even if petitioner had raised its constitutional claims below in a timely manner, certiorari would still be inappropriate. The presumed decision below is not even alleged to be in conflict with any other decision, state or federal, and is not even alleged to be directly inconsistent with prior decisions of this Court. To the contrary, none of petitioner's constitutional arguments has been adopted by any court, and most of them have been rejected by several lower courts. Moreover, petitioner relies largely on *policy arguments* in urging this Court to overturn that substantial body of case law, and those policy arguments are being actively considered by state legislatures.[5] In these circumstances, the Court need not and should not re-examine this uniform body of case law to consider a constitutional resolution of

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[5] THE ECONOMIST, Aug. 1, 1987, at 29 (in recent years 41 states have modified their tort systems, and the rest are considering changes).

issues that are currently being addressed through the legislative process.[6] Point II.

ARGUMENT

I. THE ARIZONA SUPREME COURT DID NOT CONSIDER ANY OF THE CONSTITUTIONAL QUESTIONS PETITIONER SEEKS TO RAISE HERE, BECAUSE PETITIONER WAIVED SOME QUESTIONS AND FAILED TO RAISE OTHERS IN A TIMELY MANNER, AS REQUIRED BY CONSISTENTLY APPLIED STATE PRACTICE.

It is undisputed that the Arizona Supreme Court did not consider any of the constitutional questions petitioner seeks to raise here. It is undisputed that petitioner expressly waived its Eighth Amendment argument. It is undisputed that petitioner's Due Process arguments were asserted, for the first time, after oral argument in the Arizona Supreme Court. In these circumstances, the Arizona Supreme Court's refusal to consider those constitutional questions rested on adequate and independent state grounds.

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[6] Punitive damage awards have a two century history in state tort law. For years, the insurance industry did not question the constitutionality of such awards. In recent years, the industry has launched an aggressive campaign in legislatures and courts to restrict punitive damage awards. Although dressed in constitutional clothes, that campaign is based largely on policy arguments. For example, in urging the Court below to consider its constitutional arguments, petitioner argued that Arizona has strong *policy* interests that allegedly require limitations on such awards. Supplemental Brief of Appellees at 45 (warning that because of punitive damage awards "everyone in the state will suffer as a result of increased insurance premium rates. The State of Arizona has a very real interest in seeing to it that the pendulum does not swing too far against the insurance industry."). Those arguments are best addressed by the legislative process. If the insurance industry convinces legislatures that punitive damages are contrary to public policy and should be restricted, it will not be necessary for this Court to resolve the many constitutional issues raised by petitioner and other insurance companies.

A. Petitioner's Eighth Amendment Argument Was Explicitly Waived in The Arizona Supreme Court.

Petitioner's Eighth Amendment argument is inappropriate for review because petitioner expressly waived that argument below. In seeking the Arizona Supreme Court's permission to file post-argument briefs, petitioner suggested, for the first time, that the punitive damage award might violate the Eighth Amendment's Excessive Fines Clause. Motion for Leave to File Supplemental Briefs and for Additional Oral Argument at 6. In noting that potential issue, petitioner was fully aware of the consequences if it failed to press that issue in the Arizona Supreme Court. In petitioner's words: "[w]ithout the opportunity to brief this issue for consideration by the Arizona Supreme Court, it is unlikely that appellee would be afforded an opportunity to seek relief in the federal court system if punitive damages in any amount were untilmately [sic] assessed against appellee." *Id.* at 5-6.

Nevertheless, although petitioner did file a post-argument brief, petitioner decided not to assert that Eighth Amendment argument, and instead expressly waived that argument. In its post-argument brief, after observing that *Lavoie* involved constitutional challenges to punitive damages based on the Contracts Clause, the Eighth Amendment and the Due Process Clause, petitioner stated: "[f]or purposes of the case before the court at this time, the constitutional argument will be confined to the third-noted constitutional claim in *Lavoie*—the due process argument." Supp. Br. at 37. Thus, petitioner made a deliberate decision to waive any reliance on the Eighth Amendment.

Because petitioner expressly waived any reliance on the Eighth Amendment below, its attempt to invoke that Amendment for the first time in this Court should be denied. *See, e.g., Cardinale v. Louisiana*, 394 US 437, 438 (1969) (Supreme Court will not "decide federal con-

stitutional issues raised here for the first time on review of state court decisions.").[7]

B. Petitioner's Due Process Claims Were Not Raised Below In A Timely Manner.

Untimeliness is an adequate state ground that bars review by this Court. It has long been established that for this Court to have jurisdiction to review a state court decision "the essential federal question must have been especially set up there *at the proper time* and in the proper manner . . . ." *Godchaux Co. v. Estopinal*, 251 US 179, 181 (1919) (emphasis added). Where a state supreme court decides, in accord with the consistent practice of that state, that an issue is untimely, that constitutes an adequate state ground for resolving the issue, and this Court lacks jurisdiction. *E.g., Exxon Corp. v. Eagerton*, 462 US 176, 182-183 n.3 (1983).

Petitioner acknowledges Arizona's "general rule that an appellate court will not consider a question not first raised in the lower court." *See* Petitioner's Supp. Br. at 35. In this case, the Arizona Supreme Court correctly observed that petitioner had failed to "raise its constitutional arguments in the pleadings, post-trial motions, court of appeals, petition (or cross-petition) for review, response to petition for review, or at oral argument." 733 P.2d at 1086; Pet. App. 23a-24a. The court declined to consider those issues because "[i]n light of this procedural history, we believe it does not promote sound appellate practice to consider issues *so belatedly urged.*" 733 P.2d at 1086; Pet. App. 24a (emphasis added).

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[7] *Accord District of Columbia Court of Appeals v. Feldman*, 460 US 462, 482 n.16 (1983); *Webb v. Webb*, 451 US 493, 499 (1981); *Wilson v. Cook*, 327 US 474, 483-84 (1946); *McGoldrick v. Compagnie Generale*, 309 US 430, 434-35 (1940); *Whitney v. California*, 274 US 357, 362-63 (1927); *Tacon v. Arizona*, 410 US 351, 352 (1973); *Street v. New York*, 394 US 576, 582 (1969); *Bailey v. Anderson*, 326 US 203, 207 (1945).

Petitioner argues, relying primarily on *Town of South Tucson v. Board of Supervisors*, 52 Ariz. 575, 583, 84 P.2d 581 (1938), that the Arizona Supreme Court acted improperly in declining to consider petitioner's post-argument claims. There, the court held that although it "ordinarily" would not consider issues raised for the first time on appeal, it could do so if the issue was "of a general public nature, affecting the interests of the state at large . . . ." 84 P.2d at 584. Petitioner argues that under that exception to the general rule, the Arizona Supreme Court should have considered its post-argument constitutional claims because they concerned matters of statewide importance.[8]

In making that argument, however, petitioner has been able to cite only cases in which a state's procedural requirements were *not* evenhandedly applied. *See Barr v. Columbia*, 378 US 146, 149 (1964); *Sullivan v. Little Hunting Park*, 396 US 229, 245 (1969) (Harlan, J., dissenting).[9] Petitioner's contention that the Arizona Supreme Court's decision not to consider petitioner's post-

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[8] Actually, one of petitioner's principal issues—that due process requires "clear and convincing" proof before a jury can award punitive damages—was *not* an issue of statewide importance because, prior to the decision in this case, the Arizona Supreme Court decided, as a matter of common law *policy*, to require that standard in all future punitive damages cases. *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986).

[9] Although in *Sullivan* the Court distinguished discretionary and jurisdictional rules, the great weight of authority suggests that even where procedural requirements have some element of discretion, these rules can serve as adequate state grounds where the rule is applied evenhandedly and furthers legitimate state interests. Thus Stern, Gressman & Shapiro have explained that "as long as the local procedure is applied evenhandedly and consistently, does not discriminate against the raising of federal claims, and is not used to stifle a federal claim or to evade vindication of federal rights [citing cases], the Supreme Court is likely to respect the local procedural requirement and to hold a ruling grounded on state procedure is adequate to support the judgment." R. Stern, E. Gressman & S. Shapiro, SUPREME COURT PRACTICE 181 (6th ed. 1986) (citations omitted).

argument claims constituted a "complete departure" from its settled practice, Pet. at 17-18, is completely unfounded. In the fifty years following its decision in *Town of South Tucson*, the Arizona Supreme Court has agreed to decide new issues raised by appellants because of their "statewide" significance in only a few cases, and *in every one of those cases the issue was raised by the party in a timely manner.*[10] As the court below correctly reasoned, declining to consider petitioner's post-argument claims was compelled by the policy underlying its general rule: assuring the efficient and orderly administration of justice. 733 P.2d at 1086; Pet. App. 23a.

Petitioner has not cited a single case, and respondents are not aware of any, in which the Arizona Supreme Court considered an issue raised by a party for the first time after oral argument in that court. Accordingly, there is no support for petitioner's contention that Arizona's timeliness rule has been applied in an inconsistent manner.

Because the Arizona Supreme Court's decision not to consider petitioner's Due Process claims was based on the adequate and consistently applied state ground that they were untimely, the petition for certiorari should be denied.[11] See *Judy's Foods, Inc. v. A & B Food Services*

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[10] In *Town of South Tucson, Ruth v. Industrial Commission*, 107 Ariz. 572, 490 P.2d 828 (1971), and *Defnet Land & Investment Co. v. State*, 103 Ariz. 388, 442 P.2d 835 (1968), the appellants' new arguments were raised at the outset of their appeals to the Arizona Supreme Court. The other case cited by petitioner, *Barrio v. San Manuel Division Hospital*, 143 Ariz. 101, 692 P.2d 280 (1984), provides no support for petitioner's position because in that case the parties did not belatedly ask the Court to address issues they had neglected to raise below. Instead, in *Barrio* the court itself determined that there were additional issues that required briefing and it ordered the parties to address those issues.

[11] The second basis for petitioner's contention that the lower court should have considered its constitutional claims merits only brief response. Petitioner argues that "an appellee . . . may raise on appeal any argument in support of the judgment below so long as that argument would not, if successful, expand its rights under

Corp., 107 S Ct. 460 (1986) (denying certiorari in similar circumstances).

C. Even If Petitioner's Due Process Challenges to the Preponderance Of The Evidence Standard and To The Jury's Consideration Of The "Duration" Of Petitioner's Misconduct Had Been Timely, The Arizona Supreme Court Would Not Have Considered Those Challenges Because Petitioner Failed to Object to Jury Instructions That Were Directly Inconsistent With Those Challenges.

Although the Court should deny certiorari on all of petitioner's Due Process claims because they were not raised in a timely manner, Point I.B., the Court should

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the judgment or contract the rights of the appellant." Pet. at 18. The only case petitioner cites, *Maricopa County v. Corporation Commission*, 79 Ariz. 307, 289 P.2d 183, 185 (1955), does not support the proposition that appellees can raise claims on appeal that were not raised below. Indeed, as *Maricopa* and other Arizona cases make clear, even if a claim *was* raised below, an appellee cannot rely on that claim on appeal unless the appellee has complied with additional procedural requirements. If the claim was raised and *rejected* below, the appellee cannot "present [that] rejected claim []" on appeal unless the appellee files "a cross-appeal." *Maricopa*, 289 P.2d at 185. Thus, because appellee's claims in *Maricopa* had been raised but rejected in the lower court, the appellate court refused to consider those claims on appeal since "it was necessary for appellee to cross-appeal by giving notice of appeal." *Id.* Furthermore, if a claim was raised but not decided in the lower court, the appellee need not file a "cross-appeal," but must nevertheless file a "designation of cross-question presented" or a "cross-assignment of error" in order to rely on that claim on appeal. *Santanello v. Cooper*, 106 Ariz. 262, 475 P.2d 246, 249 (1970); *Arizona Public Service Co. v. Mountain States Telephone and Telegraph Co.*, 149 Ariz. 239, 717 P.2d 918, 922 (Ct. App. 1985).

Furthermore, even if the legal principle stated by petitioner were correct, it would be inapplicable to petitioner's constitutional arguments because acceptance of those arguments would expand petitioner's rights under the trial court's new trial order. In particular, petitioner would have a right at the new trial to numerous procedural protections that were not afforded by the trial court's order.

also be aware that two of petitioner's Due Process claims—its challenge to the preponderance of the evidence standard, Pet. at 25-27, and to the jury's consideration of the "duration" of its misconduct, *id.* at 22—were not properly before the Arizona Supreme Court for an additional reason. Petitioner waived these constitutional challenges by interposing no objection to jury instructions that were squarely at odds with them.[12] Although the trial court made explicit determinations about the appropriate standard of proof and the relevance or irrelevance of the duration of petitioner's misconduct, petitioner did not object to those determinations, or to the jury instructions that embodied them.

The Arizona Rules of Civil Procedure explicitly provide that "[n]o party may assign as error the giving . . . of an instruction unless he objects thereto before the jury retires to consider its verdict . . ." Ariz. R. Civ. P. 51(a). Accordingly, it is well established in Arizona that "[a] failure to object waives the right to attack such . . . instructions on appeal." *Andrew Brown Co. v.*

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[12] Petitioner did object to any instruction on punitive damages, on the ground that there was insufficient evidence to allow the jury even to consider an award of punitive damages. Tr., vol. 5, pp. 16-19. But the trial court denied that objection, and petitioner did not then object to the form or content of the court's punitive damage instructions concerning the standard of proof or the jury's consideration of the duration of petitioner's misconduct. Accordingly, at trial the jury was instructed without objection that "[i]f you find by a *preponderance of the evidence* that the conduct of the Defendant . . . has been wanton, malicious, oppressive, willful or in reckless disregard of the rights of others, as those terms have been defined for you, then, you may in your sole discretion assess additional damages . . . known as punitive or exemplary damages . . . ." Tr., vol. 6, p. 9 (emphasis added). The jury was also instructed, without objection, that in determining the amount of any punitive damage award it could consider the defendant's wealth, "the harm caused, *the duration of any misconduct*, the profitability of any misconduct, and the degree and nature of such Defendant's conduct, and the sum which might be sufficient to require such Defendant to alter its conduct and to deter it, and others from the same sort of conduct in the future." *Id.* (emphasis added).

Painters Warehouse, Inc., 111 Ariz. 404, 531 P.2d 527, 530 (1975).[13]

Petitioner's failure to object to the jury instructions in this case is especially inexcusable because of the decision of the Arizona Court of Appeals in *Ahmed v. Collins*, 23 Ariz. App. 54, 530 P.2d 900 (1975). In *Ahmed*, the defendants argued on appeal (as petitioner sought to argue in the Arizona Supreme Court and here), that "the method by which the jury was allowed to assess [punitive] damages was unconstitutional." The court refused to consider that claim, ruling that "the instructions on punitive damages were not objected to in the trial court and defendants cannot now complain." 530 P.2d at 904. In view of that recent and controlling decision petitioner was plainly on notice that its failure to object to the trial court's instructions concerning the method by which the jury would assess punitive damages would constitute a waiver of its right to challenge on appeal the standard of proof and the jury's consideration of the duration of its misconduct.

II. EVEN IF PETITIONER HAD PROPERLY RAISED ITS CONSTITUTIONAL CLAIMS BELOW, IT WOULD BE INAPPROPRIATE TO GRANT CERTIORARI.

Even if petitioner had timely raised all of its constitutional claims, and the Arizona Supreme Court had resolved all of them against petitioner, this would still not be an appropriate case in which to grant discretionary review. Petitioner does not argue that such a decision would have been in conflict with any other decision, state or federal, and it would not. Petitioner does not argue that such a decision would have been directly inconsistent with any prior decision of this Court, and it would not.

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[13] *E.g., Grant v. Arizona Public Service Co.*, 133 Ariz. 434, 652 P.2d 507 (1982); *Sparks v. Republic National Life Ins. Co.*, 132 Ariz. 529, 647 P.2d 1127, 1135 (1982), *cert. denied*, 459 US 1070 (1982); *Southern Pacific Transportation Co. v. Lueck*, 111 Ariz. 560, 535 P.2d 599, 612 (1975).

Moreover, as respondents will now show, such a decision would not have raised important issues that urgently require resolution by this Court.

A. Petitioner's Claim That the Punitive Damage Award Was Excessive Under the Constitution Does Not Warrant Discretionary Review.

1. *Petitioner's Eighth Amendment Argument.*

After making a deliberate decision that its Eighth Amendment argument did not even warrant briefing in the Arizona Supreme Court, petitioner has resurrected that argument in its petition. Although petitioner's pursuit of that argument here is plainly foreclosed by its waiver below, even if this were not so it would be inappropriate to grant certiorari on petitioner's Eighth Amendment claim. Because that claim has been raised as a tag-a-long issue in *Bankers Life and Casualty Co. v. Crenshaw*, No. 85-1765, *see* note 4 *supra*, and has been extensively briefed in that case, respondents here will only briefly state the reasons why there is no urgent reason to review that issue in the context of this case.

First, petitioner's Eighth Amendment argument is directly contrary to this Court's prior decisions that the Eighth Amendment is inapplicable to civil proceedings. *Ingraham v. Wright*, 430 US 651 (1977) (reasoning that Eighth Amendment was intended to protect those "convicted of crimes" and to limit the power of *government* to fine or punish for its own benefit); *see* Appellee's Brief in *Bankers Life* at 27-28.

Second, petitioner's position has been uniformly rejected by the lower courts. *See Hart-Anderson v. Hauck*, Civ. No. 85-498 (Mont. March 17, 1987); *Downey Savings and Loan Ass'n v. Ohio Casualty Insurance Co.*, 234 Cal. Rptr. 835, 852 (Cal. App. 1987); *Palmer v. A.H. Robins*, 684 P.2d 187, 217 (Colo. 1984) (en banc); *Unified School District No. 490 v. Celotex Corporation*, 6 Kan. App. 2d 346, 629 P.2d 196, 206 (1981); *Daugh-*

erty v. Firestone Tire & Rubber Co., 85 F.R.D. 693, 695 (N.D. Ga. 1980); *Zhadan v. Downtown L.A. Motors*, 66 Cal. App. 3d 481, 136 Cal. Rptr. 132, 144 (1976).

Third, this Court's decision in *Ingraham*, and the unanimous body of lower court decisions, are so clearly supported by the common law and colonial history of the Eighth Amendment that there is no need for reexamination of this issue. Appellee's Brief in *Banker's Life* at 30-35. And see in that case the brief of *amici* Consumers Union of U.S., Consumer Federation of America and National Consumer League at 6-40.

Finally, even if the Excessive Fines Clause did impose substantive limits on the size of punitive damage awards to plaintiffs in civil litigation, an award would only be "excessive" if it was not proportional to the gravity of petitioner's offense or deprived petitioner of its means of livelihood. Appellee's Brief in *Banker's Life* at 37-41. Because the Arizona Supreme Court applied this test as a matter of common law, and determined that the jury's award was not excessive, acceptance of petitioner's argument would not dictate a different result in this case.

2. *Petitioner's Due Process Arguments.*

In the first of its many due process arguments, petitioner asserts that the jury's award was reinstated "only after an extraordinary exercise by the court below of judicial gymnastics in which the rules of the game were changed or ignored wherever necessary in order to reinstate the excessive award," and that the alleged improprieties of the Arizona Supreme Court violated the Due Process Clause. Pet. at 22. In petitioner's view, these so-called "gymnastics" included the court's holding that the "duration" of petitioner's misconduct could be considered in determining the amount of punitive damages that should be assessed, and deciding that the verdict was not excessive when that issue allegedly "had not been presented to the court by respondents.' Each argument is meritless.

Petitioner's claim that the Arizona Supreme Court changed "the rules of the game" by considering the duration of petitioner's conduct is remarkable in view of the fact that the trial court instructed the jury on this very issue, without any objection from petitioner. Thus, from the first stage of these proceedings the petitioner knew the "rules of the game" and accepted them as an accurate statement of Arizona law. That acceptance is not surprising, because the Arizona courts' view that duration of misconduct can be considered in deciding the amount of punitive damages is a straightforward application of the well established principle that the egregiousness of a defendant's conduct and the amount required to deter future misconduct are relevant in determining the appropriate award.[14]

Petitioner's assertion that in sustaining the amount of the punitive damage award the Arizona Supreme Court decided issues that were not before it, and thereby denied petitioner due process, is equally meritless. In challenging the court of appeals' conclusion that "the punitive damages were excessive because there was no proof of the specific amount of illicit profit made" by petitioner, respondents expressly raised as one of the questions before the Arizona Supreme Court whether the jury's "assessment of punitive damages amounting to 3½ days net

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[14] *See, e.g., Rubi v. Transamerica Title Ins. Co.*, 131 Ariz. 403, 641 P.2d 891, 894 (1982); *Flieger v. Reed*, 120 Ariz. 31, 583 P.2d 1351 (1978); *Acheson v. Shafter*, 107 Ariz. 576, 490 P.2d 832 (1971); RESTATEMENT (SECOND) OF TORTS § 908 (1979) (purpose of punitive damages is "to deter him and others like him from similar conduct in the future"). If a defendant has repeatedly engaged in certain misconduct for a long period of time, this misconduct is likely to have generated larger profits, and is more likely to be ingrained, than isolated misconduct, and the duration of that misconduct would therefore justify a larger award to deter similar misconduct in the future. On appeal, petitioner conceded that "duration of misconduct may be a factor that can be considered" if the past misconduct is relevant to the misconduct currently at issue. Response to Petition For Review to Arizona Court of Appeals at 12.

income of the defendant and based upon evidence of a systematic and profitable scheme of misconduct affecting many people" could be upheld even without evidence of the specific amount of petitioner's illicit profit. Pet. App. 71a, 67a. In its briefs in the Arizona Supreme Court, petitioner did "not take issue with the principle that a jury may determine the amount of punitive damages upon sufficient evidence," but argued at length that the jury's award of $3.5 million in punitive damages was "unsupported by the evidence." Appellee's Supplemental Reply Brief at 2; *see* Supplemental Brief of Appellee at 31-34 (arguing that "the evidence does not support the jury's $3.5 million punitive damage award").

On this record, it is difficult to understand the basis for petitioner's claim that the Arizona Supreme Court violated petitioner's constitutional rights in deciding whether the jury verdict was excessive. Petitioner seems to be implying that the Arizona Supreme Court simply manipulated the law and the issues before it in an unprincipled effort to uphold the punitive damage award. This implication is completely unsupported by the record, and is frivolous in view of the Arizona Supreme Court's history of carefully scrutinizing punitive damage awards in insurance bad faith cases.[15]

B. Petitioner's Claim That Punitive Damages Can Only Be Imposed If Every Constitutional Safeguard Available in Criminal Trials Has Been Provided Does Not Warrant Discretionary Review.

Petitioner's suggestion that the "constitutional protections due to defendants in criminal cases" must be afforded to defendants in civil cases before punitive dam-

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[15] The Arizona Supreme Court has struck down virtually every punitive damage award it has reviewed in insurance bad faith cases. *See Gurule v. Illinois Mutual Life & Cas. Co.*, 735 P.2d 85 (Ariz. 1987); *Filasky v. Preferred Risk Mutual Ins. Co.*, 735 P.2d 76 (Ariz. 1987); *Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986); *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986).

ages can be awarded has been uniformly rejected by the lower courts.[16] Furthermore, even if petitioner's claim

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[16] *Hansen v. Johns-Manville Products Corporation*, 734 F.2d 1036, 1042 (5th Cir. 1984) (holding double jeopardy clause inapplicable to punitive damage award to private litigant because the determination in such a proceeding "does not carry with it the consequences" necessary for a proceeding to be deemed "essentially criminal," the defendant would "not suffer the stigma normally accompanying criminal proceedings," and "this is not an action brought by the state, but one brought by a private individual"), *cert. denied*, 470 US 1051 (1985); *Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co.*, 234 Cal. Rptr. 835, 852 (Cal. App. 1987) (rejecting defendant's contention that imposition of punitive damage award without safeguards present in criminal proceedings was a denial of due process, because punitive damage action was civil rather than criminal in nature); *McDermott v. Kansas Public Service Co.*, 238 Kan. 462, 712 P.2d 1199, 1203 (1986) (rejecting claim that punitive damage award violated due process because of its allegedly quasi-criminal nature); *Brotherton v. Celotex Corp.*, 202 N.J. Super. 148, 493 A.2d 1337, 1344-45 (1985) (rejecting claim that punitive damage award "constitutes criminal punishment requiring constitutional guarantees," because court could find "no case law supporting these propositions," and award of punitive damages did not involve finding that defendant violated criminal laws, no stigma attached to punitive award, and the action was privately filed and funded); *Peterson v. Superior Court*, 181 Cal. Rptr. 784, 642 P.2d 1305 (Supr. Ct. 1982) (rejecting claim that ex post facto clause was applicable to civil case involving punitive damages, because "[t]he potential punitive damage award in this case is unquestionably a penalty civil in nature. There is no possibility of the stigma of a criminal conviction nor the potential loss of personal freedom."); *Unified School District No. 490 v. Celotex Corp.*, 6 Kan.App.2d 346, 629 P.2d 196, 206 (1981) (holding that imposition of punitive damages did not violate constitutional guarantee of due process or defendant's right to protection against double jeopardy, reasoning that the imposition of punitive damages "does not approach the severity of criminal sanctions and does not demand the same safeguards as do criminal prosecutions"); *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 174 Cal. Rptr. 348, 383 (1981) (rejecting claims that ex post facto and double jeopardy prohibitions were applicable to award of punitive damages in civil case); *Gibson v. Gibson*, 15 Cal.App.3d 943, 93 Cal. Rptr. 617, 621 (1971) (rejecting claim that "due process principles regarding incompetent counsel in criminal proceedings should be transported into civil proceedings" involving punitive damages);

did raise substantial constitutional questions, it would be inappropriate to review those questions in the posture they are presented here. Instead of arguing that it was denied a particular constitutional right, and seeking review of that discrete issue, petitioner asserts that *every* constitutional right provided in criminal proceedings must be afforded in civil cases when punitive damages are sought. This blunderbuss claim therefore encompasses an extraordinarily broad range of criminal procedures and rules, including the right against double jeopardy, the right of confrontation, proof beyond a reasonable doubt, trial by jury (and associated rights concerning the size of the jury and the need for a unanimous verdict), the right to effective assistance of counsel, the right to a speedy trial, the right against self-incrimination, and many others.

As this Court has often explained, "[e]ach constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own

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People v. Superior Court, 115 Cal. Rptr. 812, 819 (Supr. Ct. 1974) (availability of punitive damages "does not convert a civil action into a criminal action" and privilege against self-incrimination is inapplicable to that action); *Toole v. Richardson-Merrell Inc.*, 60 Cal. Rptr. 398, 417-18 (Ct. App. 1967) (rejecting claim that imposition of punitive damages in civil case was unconstitutional because defendant received only six peremptory challenges, a unanimous verdict was not required, the vote of nine jurors was allowed to impose a penalty, and defendant was denied the presumption of innocence). *See generally United States v. Ward*, 448 US 242 (1980) (provision in Federal Water Pollution Control Act authorizing penalty payable to government "revolving fund" of up to $5,000 for each violation of Act, which was assessed by considering the size of the business, the effect on the owner's ability to continue in business, and the gravity of the violation, was a civil penalty and Fifth Amendment's protection against self-incrimination was inapplicable); *Sedima, S.P.R.L. v. Imrex Co.*, 473 US 479 (1985) (expressing doubts that plaintiff in civil action under Racketeer Influenced and Corrupt Organizations Act must prove that predicate criminal offenses for RICO violation were committed "beyond a reasonable doubt" despite availability of treble damages if plaintiff prevailed).

impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved." *Johnson v. New Jersey*, 384 US 719, 728 (1966); *accord Brown v. Louisiana*, 447 US 323 (1980). For example, as we have explained, the Eighth Amendment is clearly inapplicable to punitive damage awards to private litigants, because the historical function of that Amendment has been to afford protection against the *government*.[17] Similarly, this Court has ruled that some of the criminal protections available to individual criminal defendants are "personal" rights and are *not* available to corporate entities.[18] Rather than deciding whether these procedures should be imposed *en masse* in civil proceedings in which private litigants seek punitive damages from corporate entities, if this Court decides to review these constitutional issues it should do so in cases where specific procedures have been requested and have been at issue, so the Court can carefully consider the history and function of each specific procedure and its applicability to proceedings seeking punitive damages from corporate entities.

This approach is dictated not only by the distinct histories and functions of different criminal procedures, but also by considerations of judicial restraint. Acceptance of petitioner's draconian position would have extraordi-

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[17] *Cf. Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 430-31 (1967) ("Of the many policies which authorities have suggested as underlying the privilege against self-incrimination, several reflect a common fear of abuse of government power through the criminal process.").

[18] Petitioner's claim assumes, for example, that a *corporate entity* can invoke the right of an individual criminal defendant not to incriminate himself. This Court has ruled to the contrary. *California Bankers Ass'n v. Shultz*, 416 US 21 (1974); *cf. Koway Enterprises, Inc. v. Pennsylvania Public Utility Commission*, 85 Pa. Comm. 1, 480 A.2d 1317 (1984) (holding that Cruel and Unusual Punishment Clause does not protect corporations); *see generally First National Bank of Boston v. Bellotti*, 435 US 765, 778-79 n.14 (1977) ("certain 'purely personal' [constitutional] guarantees . . . are unavailable to corporations").

nary consequences for state tort systems.[19] To provide only a few of countless possible examples: (1) If the Double Jeopardy Clause were applicable to all civil cases in which punitive damages were sought (encompassing a very broad range of conduct regulated by the common law), governmental law enforcement efforts to challenge the same or related conduct would be significantly impeded. To avoid having criminal prosecutions (or civil cases seeking punitive damages) foreclosed by other proceedings to which "jeopardy" attaches, law enforcement officials (and private litigants) would be forced to engage in a "race to the courthouse." (2) Because plaintiffs can ordinarily seek punitive damages only in civil cases in which compensatory or other damages are available, and because criminal safeguards are not even arguably required before these other damages can be awarded, acceptance of petitioner's position would require radical changes in the conduct of civil cases where punitive damages are sought. Although criminal safeguards would be required on the punitive damages issues, the other issues would be governed by the procedures traditionally employed in civil cases: thus, lower courts and juries would have to apply one set of rules for punitive damages claims and different rules for the plaintiff's other claims (*e.g.*, a less than unanimous verdict would be permissible on the other claims, different standards of evidence would apply, etc.).[20]

In short, the unprecedented path on which petitioner asks this Court to embark would require wholesale revision of state tort systems by the judiciary (at a time

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[19] *See generally Silkwood v. Kerr-McGee Corp.*, 464 US 238, 255 (1984) (recognizing that "[p]unitive damages have long been a part of traditional state tort law").

[20] Similarly, a civil plaintiff's ability to take discovery—even with respect to its claim for compensatory damages—would be significantly impeded, because no individual could be compelled to provide information that could arguably subject him to a punitive damage award and thus violate his right against "self-incrimination."

when the legislative and electoral process is actively considering the wisdom of legislating procedural and substantive changes).[21] Even if the Court decided it was essential to address some of these constitutional issues now, instead of waiting until this nationwide legislative debate is completed, it would be appropriate to do so in a cautious and careful manner. For this reason, the Court should decline to review petitioner's effort to raise all of those issues here.

Finally, it would be inappropriate to allow petitioner to raise the applicability of any of these criminal procedural protections, all of which apply at the trial level, because petitioner did not request any of these procedural protections at trial. Petitioner never claimed below (or even here) that respondents' lawsuit actually subjected petitioner to double jeopardy or forced petitioner to incriminate itself, or violated petitioner's right to a speedy trial. Petitioner did not object to jury instructions embodying the civil standard of proof, the size of the jury (eight) would have been constitutionally sufficient even in a criminal case,[22] and the jury's verdict was, in fact, unanimous. Tr., vol. 6, pp. 10, 13.

C. Petitioner's Claim That Even In Civil Cases The Due Process Clause Requires "Clear and Convincing Evidence" Before Punitive Damages Can Be Imposed Does Not Warrant Discretionary Review.

Although petitioner did not object when the trial judge instructed the jury that punitive damages could be awarded if the requisite showing was made by a "pre-

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[21] Art. 2 Section 31 and Art. 18 Section 6 of the Arizona Constitution prohibit statutory limitations on the amount of damages that can be recovered for injuries. A referendum initiative, Proposition 103, that would have amended the Constitution to permit legislative restrictions on the amount of punitive damage awards was defeated by the electorate at the Fall, 1986 election.

[22] *Williams v. Florida*, 399 US 78 (1970) (upholding constitutionality of six person jury in criminal cases); *see Ballew v. Georgia*, 435 US 223 (1978).

ponderance of the evidence," petitioner now claims that the Due Process Clause requires the "clear and convincing" standard of proof even in civil proceedings, before punitive damages can be imposed. Relying on cases in which the Court required this higher standard to be met before the government could permanently terminate parental rights,[23] and before the government could involuntarily commit an individual to a mental institution for a potentially unlimited period of time,[24] petitioner argues that a multi-billion dollar corporation being sued for punitive damages by one of its insureds is entitled to the same heightened protection.

Even if the Arizona Supreme Court had considered this constitutional claim and had resolved it against petitioner, that decision would not be appropriate for review because any decision by this Court would directly affect only petitioner, and would not affect any other persons subject to the jurisdiction of the court below. *Rice v. Sioux City Memorial Park Cemetery*, 349 US 70, 79 (1954) ("'it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties'") (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 US 387, 393 (1923)). Because the Arizona Supreme Court has now decided, as a matter of common law policy, that all future punitive damage cases in that state will be governed by the "clear and convincing" standard, this issue is no longer of importance in the only jurisdiction bound by decisions of the Arizona Supreme Court. *See Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986).

It would also be inappropriate for the Court to review petitioner's claim concerning the standard of proof in order to resolve this issue immediately and establish a binding constitutional rule for other jurisdictions. In

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[23] *Santosky v. Kramer*, 455 US 745 (1982).

[24] *Addington v. State of Texas*, 441 US 418 (1979).

contrast to petitioner's other constitutional arguments, respondents are aware of no lower court case in any jurisdiction that has decided this constitutional claim. The doctrine of judicial restraint teaches that this issue can most appropriately be resolved by first allowing the lower courts to consider and address different arguments concerning this issue, and thereby develop an informed body of case law this Court can look to if it ultimately proves necessary to review this issue. *See, e.g., McCray v. New York*, 461 US 961, 963 (1983) (Opinion of Stevens, J., joined by Blackman, J., and Powell, J., respecting denial of several certiorari petitions) (denying certiorari "to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court"). This is especially true in the circumstances of this case, for if the insurance industry is successful in persuading lower courts, as a matter of *common law*, or state legislatures, as a matter of policy, to adopt a clear and convincing evidence standard, it will not be necessary for this Court to consider petitioner's constitutional argument.[25]

D. Petitioner's Claim That The Due Process Clause Requires That Common Law Rules Restricting the Imposition of Punitive Damages Be Applied To All *Civil* Cases Pending on Appeal Does Not Warrant Discretionary Review.

Petitioner's final constitutional challenge to the punitive damage award is based on the fact that after adopting the "clear and convincing" standard as a matter of common law in *Linthicum v. Nationwide Life Insurance Co.*, 150 Ariz. 326, 723 P.2d 675 (1986), the Arizona Supreme Court declined to apply that standard to this case, even though this case was argued on the same day as *Linthicum*. Petitioner states that "[i]t would be difficult to posit two cases in which two similarly situated

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[25] *See* Pet. at 25-26 & nn. 9 & 10 (indicating that four state courts have modified the common law on policy grounds, and six states have passed legislation, to impose a heightened standard of proof in punitive damage actions).

defendants had been subjected to more disparate treatment . . . ." Pet. at 28. Petitioner argues that under the principle established by this Court's decision in *Griffith v. Kentucky*, 93 L Ed 2d 649 (1987), it is unconstitutional for a state court not to apply a common law restriction on punitive damages to civil cases pending on appeal. *Id.*[26]

In claiming that it was treated differently from the defendant in *Linthicum*, petitioner has neglected to mention a crucial fact. The Arizona Supreme Court found the evidence before it in *Linthicum* insufficient to justify punitive damages, but it did *not* reach that result because of its application of a higher standard of proof. Instead, the court expressly stated that the evidence was insufficient to permit punitive damages *"irrespective of whether the burden of proof is clear and convincing evidence or the lesser standard of a preponderance of the evidence."* 723 P.2d at 681 (emphasis added). Thus, there is no factual basis for petitioner's claim that it was a victim of "disparate treatment."

Furthermore, even if there were a factual basis for petitioner's claim, petitioner's legal claim does not present a substantial issue. In *Griffith*, this Court held that the constitution requires that new rules governing "the conduct of *criminal prosecutions*" must be applied retroactively to pending cases. 93 L Ed 2d at 661 (emphasis added). At the same time, the Court expressly reaffirmed the well established and quite different rule for civil cases, stating that "the area of civil retroactivity . . . continues to be governed by the standard announced in *Chevron Oil Co. v. Huson*, 404 US 97, 106-107 (1971)."

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[26] Petitioner also briefly suggests that if the Court addresses the tag-a-long issue in *Bankers Life* and holds that "the Eighth Amendment applies to . . . punitive damage awards in civil cases," the Court will need to decide the applicability of that holding to this case. Pet. at 28. As explained earlier, however, no Eighth Amendment issue is properly raised in this case because petitioner expressly waived its Eighth Amendment claim in the court below. Point I.A.

93 L Ed 2d at 657 n.8. That is the standard the Arizona Supreme Court applied. 733 P.2d at 1087; Pet. App. 25a.

Because the lower courts have uniformly rejected contentions that cases seeking punitive damages must be treated like criminal cases, *see* Point II.B, *supra*, there is no need to reexamine the lower court's decision to apply *Huson*'s civil test here.[27]

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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[27] Applying the *Huson* test, the Arizona Supreme Court held that the *Linthicum* rule need not be applied retroactively. Petitioner has not argued here that the Arizona Supreme Court incorrectly applied the three prongs of the *Huson* test. In particular, the Arizona Supreme Court ruled that retroactive application of the *Linthicum* rule was not compelled by the policy underlying that rule. 733 P.2d at 1087; Pet. App. 26a. The Arizona Supreme Court was of course well acquainted with the policy considerations that led it to adopt the *Linthicum* rule as a matter of Arizona common law, and was therefore best situated to determine whether those policy considerations required retroactive application of that common law rule in this case.